IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Asheville Division
Case No.: 1:07 -cv-00231-LHT-DLH

C. BURGESS
Plaintiff,
vs.

EFORCE MEDIA, INC., IWIZARD HOLDING, INC., ADKNOWLEDGE, INC., BASEBALL EXPRESS, INC., ALLEN-EDMONDS SHOW CORPORATION, INTERSEARCH GROUP, INC., TRUSCO MANUFACTURING COMPANY, PRICEGRABBER.COM, INC., SHOPZILLA, INC., DAZADI, INC., SIX THREE ZERO ENTERPRISES, LLC,

Defendants.

MEMORANDUM FOR RULE 12(b)(6) MOTION BY DEFENDANTS EFORCE MEDIA, INC. AND ADKNOWLEDGE, INC.

The motions to dismiss brought by Defendants Eforce Media, Inc. ("Eforce") and Adknowledge, Inc. ("Adknowledge") should be granted because the federal CAN-SPAM Act controls the Plaintiff's claims; and the Plaintiff has no standing to bring a private enforcement action under the Act. Therefore the Plaintiff has failed to state a claim for which relief may be granted, and the Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6).

FACTS IN LIGHT MOST FAVORABLE TO NONMOVANT

It is important to note that in his Complaint the Plaintiff distinguishes between two separate groups of Defendants.

Both Adknowledge and Eforce are "Count One" Defendants in the Plaintiff's Complaint. Unlike the "Count Two" Defendants, the Plaintiff does not allege that Adknowledge, or Eforce, or any of the other Count One Defendants placed any type of "viruses" or "worms"upon his computer. Instead, the Plaintiff simply alleges that the

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Count One Defendants sent him unsolicited emails after he asked them to stop.

Therefore, the following facts are taken from the Plaintiff's Complaint regarding the "Count One" Defendants Adknowledge and Eforce:

1. The Plaintiff is the owner of a personal computer.

2. The Plaintiff began to receive commercial emails on that computer.

3. The receipt of said emails allegedly had the unwanted effect of slowing the operation of the Plaintiff's computer, and forcing the Plaintiff to spend time removing said emails.

4. The Defendants failed to stop sending emails to the Plaintiff within 10 days of being asked to do so.

DISCUSSION

I. THE PLAINTIFF DOES NOT HAVE STANDING TO PURSUE HIS CLAIMS AGAINST THE ANSWERING DEFENDANTS

A motion to dismiss should be granted if the complaint fails to allege the elements for a cause of action, or facts sufficient to support such elements. *Pritchard v. Sladoje*, 2007 WL 959513 (W.D.N.C., 2007). Moreover, allegations must be stated in terms that are neither vague nor conclusory. *Id.*, 2007 WL 959513.

Federal Preemption

The CAN-SPAM Act controls the instant dispute because the Act explicitly pre-empts state law.

15 U.S.C.A. § 7707(b)(1) states:

> This chapter supercedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

Case law has interpreted this language to mean that in the absence of fraud (which has not been plead in the instant action), the federal CAN-SPAM act controls suits based on excessive commercial emails. *Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 (C.D. Cal., 2007)

Similarly, *Omega World Travel Incorporated v. Mummagraphics, Incorporated*, 469 F.3d 348 (United States Court of Appeals, Fourth Circuit, 2006) held that the CAN-SPAM Act supercedes any state laws dealing with commercial emails, except to the specific extent that the claims deal with falsity or deception.

With regard to the answering Defendants, the Plaintiff's claims do not deal with, nor has the Plaintiff plead, any facts suggesting that falsity or deception is at issue in the present case. Therefore, the federal CAN-SPAM Act controls the instant action.

Lack of Standing

The CAN-SPAM Act's provisions afford only certain enumerated parties the right to bring an enforcement action. The Plaintiff in the instant action is not such a party. As a result, the Plaintiff has no standing to bring an enforcement action, and his claims should be dismissed with prejudice.

The CAN-SPAM Act's enforcement provisions explicitly empower the Federal Trade Commission, and other federal agencies, to pursue violations of the Act. *Gordon v. Virtumundo, Inc.*, 2007 WL 1459395 (U.S.W.D., Washington Division, 2007)

However, only a limited private right is provided under the statute; and that right is specifically limited to "provider[s] of Internet access service . . . "[1]. *Id.*, 2007 WL

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[1]47 U.S.C.A. § 151 defines an Internet Access Service as " . . . a service that enables users to access content, information, electronic mail, or other services offered over the internet . . . " The CAN-SPAM Act's Senate Report (108-102, at 3), provides Microsoft's MSN mail service, Hotmail, and Earthlink as examples of valid "IAS's".

1459395. Therefore, pursuant to the explicit language of the statute, a private party who is not an Internet Access Service ("IAS") does not have standing to bring suit to enforce the provisions of the Act. (See also *Facebook v. ConnectU*, 2007 WL 1514783 (N.D.Cal., 2007), holding that a private party cannot bring a cause of action under the Act unless the party is an internet service provider.)

The Plaintiff has not plead any facts asserting or suggesting that he is in any way a valid Internet Access Service provider. In contrast, the Plaintiff has only plead facts suggesting that he is a private individual who owns a personal computer. Therefore, the Plaintiff may not take advantage of the limited private right exception, and as a result he has no standing to bring a claim under the CAN-SPAM Act.

Additionally, the CAN-SPAM Act provides that in order to bring a private claim, a valid-IAS Plaintiff must also establish that as a result of the Defendant's conduct, the Plaintiff has suffered an "adverse effect" which is both "real" and "of the type uniquely experienced by IAS's". *Id.*, 2007 WL 1459395. Uniquely-experienced IAS-concerns include problems such as "higher bandwidth utilization," "excessive hardware and software upgrades," and the need to invest in extra employees in order to deal with increased customer complaints.

Uniquely-experienced IAS-concerns do not include private individuals with personal computers suffering "loss of time and productivity in having to constantly remove the emails sent to him . . . " (*Plaintiff's Complaint*, Paragraph 23)

In *Gordon*, the Court specifically stated:

> Indeed, the only harm Plaintiffs have alleged is the type of harm typically experienced by most e-mail users. The fact that Congress did not confer a private right of action on consumers at large means that "adverse effect" as a *type* of harm must rise beyond the annoyance of spam.
> (emphasis in original)

In the instant action, the Plaintiff is not an Internet Access Service provider, and has not demonstrated any adverse effects as required by the explicit language of the statute and case law. The Plaintiff therefore has no standing to bring the instant actions, and the Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6).

Punitive Damages

Punitive damages may be awarded only if the claimant proves the aggravating factors of willful or wanton conduct. *Faris v. SFX Entertainment, Inc.*, 2006 WL 3690632 (W.D.N.C., 2006) Furthermore, these aggravating factors must be proven by clear and convincing evidence. *Id.*, 2006 WL 3690632 (W.D.N.C., 2006) The Plaintiff has not pled any specific facts suggesting that the answering Defendants have perpetrated a fraud, acted with malice, or acted in a willful or wanton fashion. Therefore, the Plaintiff has not pled sufficient facts to establish by clear and convincing evidence that the answering Defendants should be subjected to punitive damages, and this portion of Plaintiff's complaint should be dismissed.

CONCLUSION

Therefore, the facts as alleged in the Plaintiff's complaint are insufficient to state a claim for relief as to the moving Defendants Adknowledge and Eforce Media, the case against them should be dismissed pursuant to Rule 12(b)(6).

This the 19 Day of July, 2007.

TEMPLETON & RAYNOR, P.A.

s/Kenneth R. Raynor
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day duly noticed electronically through the CM/ECF system, and by serving a copy of the **Memorandum for Rule 12(b)(6) Motion by Defendants Eforce Media, Inc. and Adknowledge, Inc.** by depositing a copy of the same in the United States Mail, first-class, postage prepaid, the following attorney or attorneys for said parties:

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